

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

AMERICAN VIDEO GRAPHICS, L.P.,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO.
	§	
vs.	§	6:05-CV-006
	§	
MICROSOFT CORPORATION,	§	JURY TRIAL
	§	
Defendant.	§	

ORDER

Before the Court are Microsoft's Expedited Motion to Compel AVG to Supplement Infringement Contentions Pursuant to P.R. 3-1 (Docket No. 90) and Microsoft's Motion for Expedited Ruling on Its Motion to Compel (Docket No. 89). Given that AVG voluntarily responded to Microsoft's motion to compel under an abbreviated response time and that the Court is now ruling on Microsoft's motion to compel, the Court **DENIES** as moot Microsoft's motion to expedite. Having considered the parties' written submissions, the Court **GRANTS in part** Microsoft's motion to compel.

Microsoft moves the Court to compel AVG to supplement its preliminary infringement contentions ("PICs") with respect to U.S. Patent No. 4,694,286.¹ Microsoft argues that AVG's PICs do not adequately identify where the asserted claims can be found in Microsoft's source code. Microsoft contends that it has repeatedly asked AVG to supplement its PICs and, to assist AVG in

¹ Microsoft originally included U.S. Patent No. 4,761,642 in its motion, but withdrew that patent from the motion after AVG supplemented its infringement contentions.

doing so, has given AVG additional portions of its source code, which eventually culminated in giving AVG the entire source code for Windows 2000 and Windows XP.

Microsoft also alleges that when AVG served its PICs, AVG already possessed detailed infringement analysis it had received from Discovision. This analysis contained claim charts for both patents in suit and was prepared for Discovision by two of AVG's current principals. Microsoft contends when AVG served its PICs, AVG knew which module of the Windows systems infringed the patents, but still has not disclosed this module to Microsoft.

AVG responds that it did disclose Discovision's infringement analysis in its document production, but was unwilling to adopt those contentions as its own without performing its own analysis. AVG also admits that it did suspect which Windows module infringed, but it was unwilling to bind itself to that speculation before it conducted its analysis. AVG blames its piecemeal acquisition of the source code for the delay in producing more accurate PICs. AVG states that it intends to supplement its PICs as soon as possible.

The issue of adequate PICs directed to software is a familiar issue to the Court. As the parties know, the issue arose in the Game Publishers case. As the Court recognized in its March 11, 2005 Order, "Software cases present unique challenges for the parties and the courts because, prior to discovery, plaintiffs usually only have access to the manifestation of the defendants' allegedly infringing source code and not the code itself. . . . To the extent defendants are given vague infringement contentions, they are hampered in their ability to prepare their defense."

This case is set for trial on January 9, 2006. The current discovery deadline is October 14, expert witness designations are due September 9, and rebuttal expert witness designations are due September 23. It is becoming imperative for both parties that the infringement contentions are

narrowed and finalized so that they can prepare for trial. Therefore, the Court **GRANTS** Microsoft's motion in part and **ORDERS** AVG to supplement its infringement contentions as soon as it can but no later than September 30, 2005. After September 30, 2005, the Court will require a strict showing of good cause to supplement the infringement contentions. If necessary, the parties may submit proposed pretrial deadlines that accommodate this Order. All other relief is **DENIED**.

So ORDERED and SIGNED this 1st day of September, 2005.

A handwritten signature in black ink, appearing to read "LEONARD DAVIS", is written over a horizontal line. The signature is fluid and cursive, with a large loop on the left and a smaller loop on the right.

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**